Samuhum a/l Karapanan v Ketua Polis Daerah Melaka Tengah & Ors

HIGH COURT (MELAKA) — ORIGINATING SUMMONS NO MT1–24–172 OF 2002

LOW HOP BING J

12 MAY 2005

Administrative Law — Rights and liabilities of public servants — Dismissal of public officer — Right to representation at disciplinary enquiry — Failure to apply for representation — Whether right of representation denied — Police (Conduct and Discipline) (Junior Police Officers and Constables) Regulations 1970 reg 5

Administrative Law — Rights and liabilities of public servants — Rules of natural justice — Burden to prove malice and breach of rules of natural justice — Allegations in affidavit evidence alone, whether sufficient — Whether burden of proof on plaintiff

Civil Procedure — Costs — Solicitor and client — Action against persons acting in execution of statutory or other public duty — Whether award of costs on a solicitor-client basis — Public Authorities Protection Act 1948 s 2(b)

Civil Procedure — Government proceedings — Costs — Whether award of costs on solicitor-client basis — Public Authorities Protection Act 1948 s 2(b)

The plaintiff, a police lance corporal, was found guilty of disciplinary charges against him and was dismissed at the end of a disciplinary enquiry. The plaintiff applied for a declaration that the decision of the first defendant D1 in terminating his service was wrongful, null and void, being in contravention of the rules of natural justice; and for the plaintiff be reinstated to the service. The plaintiff's allegations essentially revolve around the issues of bad faith and breach of the rules of natural justice.

The issues for determination were:

(1) whether the adjudicating officer D1 had denied the plaintiff's right to representation, thereby contravening reg 5 of the Police (Conduct and Discipline) (Junior Police Officers and Constables) Regulations 1970 ('the Regulations') — it was alleged that D1 had deliberately frustrated the plaintiff's right;

(2) who bore the burden of proving the allegations made against D1 in relation to malice and breach of the rules of natural justice. In this case the plaintiff's application was supported by way of mere affidavits although D1 had put the plaintiff to strict proof of the allegations; and

(3) whether the plaintiff had proved malice and breach of the rules of natural justice in the enquiry conducted by D1 — it was argued that D1 had prejudiced

the plaintiff's case and subjected the plaintiff to intense mental distress and anxiety by prolonging the period of suspension

Held, dismissing the plaintiff's originating summons:

(1) The discretion to grant or refuse permission to be represented is a judicial or quasi-judicial discretion which must be exercised judicially having regard to established principles and all the facts and circumstances in each particular case (see para 32). This permission to be represented, once granted by the adjudicating officer, shall be elevated to the status of a right under reg 5(3), as the police officer ('the representor') nominated by the plaintiff shall be made available to appear at the enquiry (see para 33). After the elevation of the permission under reg 5(1) to a right under reg5(3), such a right is subject to two conditions subsequent, viz first the representor must agree, ie ready, able and willing to represent the plaintiff and secondly it is not inexpedient for the representor to appear for the plaintiff at the enquiry (see para 34). Since the facts show that in relation to the enquiry held on 31 October 2000 and continued on 3November 2000, the plaintiff had made no application for permission under reg 5(1), there was no question of denying or depriving the plaintiff of his right to representation. The plaintiff had by such conduct failed to avail himself of the permission to be represented at the enquiry by a police officer of his choice (see para 39).

(2) D1's rejection of the plaintiff's application of several named representors was not in contravention of reg 5(1) or (3) as it would be inexpedient for them to represent the plaintiff at the respective enquiry, which in any event did not proceed as scheduled. Hence, there was no denial of the plaintiff's right to representation (see para 40).

(3) The plaintiff's allegations were serious and could not be resolved by way of mere affidavits, especially when they had been vigorously and vehemently denied in the affidavits affirmed by D1. As conceded by the plaintiff's learned counsel, there can be no doubt that the burden of proof was on the plaintiff (see para 47).

(4) The adjudicating officer D1 had done what regs 6(3)(b) and 6(6) required of him and had indeed given the plaintiff the opportunity of pleading in mitigation before the punishments were meted out (see para 58). In the absence of *viva voce* evidence which is to be tested by way of cross-examination and re-examination, upon which an evaluation and assessment may be embarked upon, so as to arrive at a mature consideration, the court was unable to say that the plaintiff had discharged his burden of proving the allegations of D1's bad faith and breach of the rules of natural justice on a balance of probabilities (see para 59).

(5) As the plaintiff's originating summons was commenced against, *inter alia*, D1 for D1's act done in pursuance or execution of the Regulations or of his public duty or authority as the adjudicating officer, and judgment had been obtained, *inter alia*, by D1, the clear provisions of s 2(b) of the Public Authorities Protection Act 1948 viz the words 'shall carry costs to be taxed as between solicitor and client' make it mandatory for the award of costs on a solicitor-client basis (see para 64).

[**Bahasa Malaysia summary**

Plaintif, seorang anggota polis berpangkat lans korporal, didapati bersalah atas pertuduhan tatatertib dan dipecat di akhir siasatan tatatertib. Plaintif memohon satudeklarasi bahawa keputusan defendan pertama D1 dalam menamatkan perkhidmatannya adalah salah, terbatal dan tidak sah, kerana bercanggah dengan rukun keadilan semula jadi; dan agar plaintif dikembalikan ke jawatan asal dalam perkhidmatan. Pengataan plaintif khususnya berkisarkan persoalan niat jahat dan perlanggaran rukun keadilan semula jadi.

Persoalan yang perlu ditentukan adalah:

(1) sama ada pegawai penghukuman D1 menafikan hak representasi plaintif, yang dengan itu bertentangan dengan per 5 Peraturan-Peraturan Polis (Kelakuan dan Disiplin) (Pegawai Polis Junior dan Konstabel) 1970 ('Peraturan itu') — ia dikatakan bahawa D1 secara sengaja menidakkan hak plaintif;

(2) siapa yang mempunyai beban untuk membuktikan pengataan yang dibuat terhadap D1 berkaitan niat jahat dan perlanggaran rukun keadilan semula jadi. Dalam kes ini, permohonan plaintif disokong oleh afidavit-afidavit sahaja meskipun D1 telah meletakkan plaintif untuk membuktikan pengataan dengan ketat; dan

(3) sama ada plaintif telah membuktikan niat jahat dan perlanggaran rukun keadilan semula jadi dalam siasatan yang dikendalikan oleh D1 — ia dihujahkan bahawa D1 telah memprejudiskan kes plaintif dan menyebabkan plaintif mengalami gangguan mental dan kerunsingan yang amat dengan melengah-lengahkan tempoh penggantungan.

Diputuskan, menolak saman pemula plaintif:

(1) Budi bicara untuk membenar atau menolak kebenaran untuk representasi adalah budi bicara kehakiman atau quasi-kehakiman yang perlu digunakan secara adil berdasarkan prinsip-prinsip yang ditetapkan dan semua fakta dan keadaan dalam setiap kes (lihat perenggan 32). Kebenaran untuk direpresentasikan, setelah diberikan oleh pegawai penghukuman, hendaklah menjadi satu hak di bawah per 5(3), memandangkan pegawai polis 'representasi' yang dilantik oleh plaintif hendaklah bersedia untuk hadir

semasa siasatan (lihat perenggan 33). Setelah kebenaran itu ditingkatkan di bawah per 5(1) kepada satu hak di bawah per 5(3), hak sedemikian adalah tertakluk kepada dua syarat yang berikutnya, di mana pertamanya representasi perlu bersetuju, iaitu bersedia, berupaya dan ingin mewakili plaintif dan keduanya ia tidak melengahkan untuk hadir mewakili plaintif semasa siasatan itu (lihat perenggan 34). Memandangkan fakta menunjukkan bahawa siasatan yang diadakan pada 31Oktober 2000 dan bersambung pada 3 November 2000, plaintif tidak membuat apa-apa permohonan untuk kebenaran di bawah per 5(1), tiada persoalan tentang penafian plaintif terhadap haknya untuk representasi. Plaintif telah melalui perbuatannya tersebut gagal untuk mendapatkan kebenaran untuk direpresentasikan semasa siasatan oleh pegawai polis pilihannya (lihat perenggan 39).

(2) Penolakan D1 terhadap permohonan plaintif untuk beberapa orang yang dinamakan sebagai representasi tidak bertentangan dengan per 5(1) atau (3) kerana ia akan melengah-lengahkan mereka untuk mewakili plaintif dalam siasatan tersebut, yang dalam apa keadaan tidak diteruskan seperti yang ditetapkan. Justeru itu, tiada penafian terhadap hak plaintif untuk representasi (lihat perenggan 40).

(3) Pengataan plaintif adalah serius dan tidak boleh diselesaikan dengan afidavit-afidavit itu sahaja, terutamanya apabila mereka telah menafikan sekeras-kerasnya dalam afidavit-afidavit yang disahkan oleh D1. Seperti yang dihujahkan oleh peguam plaintif yang bijaksana, tiada keraguan bahawa beban bukti terletak atas plaintif (lihat perenggan 47).

(4) Pegawai penghukuman D1 telah melakukan apa yang dikehendaki oleh per 6(3)(b) dan per 6(6) dan telah memberikan plaintif peluang untuk membuat pliding semasa mitigasi sebelum hukuman diputuskan (lihat perenggan 58). Dalam ketiadaan keterangan *viva voce* yang perlu diuji dalam pemeriksaan balas dan pemeriksaan semula, yang mana satu penilaian dan penaksiran dapat diputuskan, agar dapat satu pertimbangan yang tepat, mahkamah tidak dapat mengatakan bahawa plaintif telah melepaskan beban membuktikan pengataan D1 yang berniat jahat dan perlanggaran rukun keadilan semula jadi itu atas imbangan kebarangkalian (lihat perenggan 59).

(5) Memandangkan saman pemula plaintif dimulakan terhadap, antara lain, D1 kerana tindakan D1 yang dilakukan menurut atau berikutan penyempurnaan peraturan atau kewajipan awam atau kuasa beliau sebagai pegawai penghukuman, dan penghakiman telah diperoleh, antara lain, oleh D1, peruntukan nyata s 2(b) Akta Perlindungan Pihak Berkuasa Awam 1948 melalui perkataan-perkataan 'shall carry costs to be taxed as between solicitor and client' menjadikan ia mandatori untuk membuat satu award untuk kos berdasarkan hubungan peguamcara-anakguam (lihat perenggan 64).]

Notes

For cases on dismissal of public officer, see 1 *Mallal's Digest* (4th Ed, 2002 Reissue) paras 671–673.
For cases on rules of natural justice, see 1 *Mallal's Digest* (4th Ed, 2002 Reissue) paras 684–686.
For cases on government proceedings generally, see 2(1) *Mallal's Digest* (4th Ed, 2004 Reissue) paras 2530–2544.
For cases on solicitor and client cost, see 2(1) *Mallal's Digest* (4th Ed, 2004 Reissue) paras 1894–1902.

Cases referred to

Lembaga Tatatertib Perkhidmatan Awam Hospital Besar Pulau Pinang & Anor v Utra Badi a/l K Perumal [2001] 2 MLJ 417 (refd)
Mohd Zaki bin Meon v Hj Mohd Said bin Fadzil & 3 Ors Johor Bahru High Court Civil Suit 22–144 of 1997 (unreported) (refd)
Narinder Singh a/l Jaswant Singh v Ketua Palis Daerah Georgetown & Ors [1996] MLJU 246 (refd)
Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor [1996] 1 MLJ 261 (refd)
Tenaga Nasional Bhd v Perwaja Steel Sdn Bhd [1995] 4 MLJ 673 (refd)
Utra Badi K Perumal v Lembaga Tatatertib Perkhidmatan Awam, Hospital Besar Pulau Pinang & Anor [1998] 3 MLJ 676 (refd)
Yeap Seok Pen v Government of the State of Kelantan [1986] 1 MLJ 449 (refd)

Legislation referred to

Evidence Act 1950 s 101
Federal Constitution arts 8(2) and 135(2)
Police (Conduct and Discipline) (Junior Police Officers and Constables) Regulations 1970 sch 2(12), (32), (46), regs 3(4), 5, 6(3)(b), (6)
Police (Conduct and Discipline) (Junior Police Officers and Constables) (Repeal) Regulations 2000
Public Authorities Protection Act 1948 s 2(b)
Public Officers (Conduct and Discipline) (Chapter D) General Orders 1980 GO 26(4)

Sivenasan Achalingam (A Sivanesan & Co) for the plaintiff.
Narkunavathy Sundareson (Senior Federal Counsel) (Attorney General's Chambers) for the defendants.

Low Hop Bing J:

1 APPLICATION

[1] This is the plaintiff's application by way of originating summons in encl (1) for a declaration that:

(1) the decision of the first defendant in terminating the service of the plaintiff as a member of the Royal Malaysian Police is wrongful, null and void, being in contravention of the rules of natural justice;

(2) the plaintiff be reinstated to the service without any reduction of salary or seniority, with effect from 12 January 2000;

(3) costs; and

(4) such other reliefs as the court deems fit.

[2] The first defendant was at the material time the Melaka Tengah OCPD holding the rank of Assistant Commissioner of Police and is an agent or employee of the second defendant the Inspector General of Police and third defendant the Government of Malaysia.

[3] The defendants are referred to as D1, D2 and D3 respectively.

II Factual Background

[4] On 2 May 1982, the plaintiff commenced service as a police constable with the Royal Malaysian Police and has since been confirmed in the permanent and pensionable post of lance corporal.

[5] In 1991, 1995 and 2001, the plaintiff had been charged in court under ss 377, 377D and 384 of the Penal Code respectively, and had been acquitted and discharged.

[6] By letter dated 20 January 2000, captioned 'Perintah Tahan Kerja' ('Interdiction Order') signed by D1, the plaintiff was interdicted with effect from 12 January 2000 ie the date of the plaintiff's arrest, pending investigation against his conduct vide MIA/KST: 1/2000 in connection with Bandar Hilir Report No 86/2000 (Melaka Tengah IP: 119/2000).

[7] By letter dated 23 March 2000, captioned 'Pemberitahu Pertuduh dan Tatatertib' (Notice of Disciplinary Charges) ('the disciplinary notice'), D1 informed the plaintiff that disciplinary proceedings would be taken against the plaintiff under the Police (Conduct and Discipline) (Junior Police Officers and Constables) Regulations 1970 (PU(A) 86/1970) ('the Regulations'), on the following disciplinary charges:

1 Berkelakuan dengan cara tidak senonoh atau dengan cara yang memudaratkan tatatertib atau yang mungkin mencemarkan nama baik Pasukan atau perkhidmatan awam, di bawah Jadual 2(12);

2 Menggunakan dengan tidak sepatutnya kedudukan sebagai anggota Pasukan bagi faedah persendirian, di bawah Jadual 2(32); and

3 Enggan atau cuai membuat apa-apa catitan yang berkewajipan membuat, di bawah Jadual 2(46).

(In English:

1 Behave in a disorderly manner or in a manner which is prejudicial to discipline or which is likely to bring discredit on the reputation of the Force or the public service under sch 2(12);

2 Improperly use your position as a member of the Force for your private advantage under sch 2(32); and

3 Refuse or neglect to make entry which is your duty to make under sch 2(46).)

[8] For the avoidance of doubt, all references hereinafter to a regulation and a schedule are references to the regulation and the schedule in the regulations, still in force until 31 December 2000, when it was repealed by the Police (Conduct and Discipline) (Junior Police Officers and Constables) (Repeal) Regulations 2000 which in turn came into operation on 1 January 2001 vide PU(A) 451/2000.

[9] In para 4 of the disciplinary notice, the plaintiff was informed that he had the right to be represented by a police officer at the disciplinary enquiry ('the enquiry'). The plaintiff's affidavit averred that he had endeavoured to appoint a police officer for this purpose but on each occasion the police officer who had initially agreed to represent the plaintiff had for a variety of reasons eventually withdrawn himself; or D1 had allegedly rejected the names of the police officer proposed by the plaintiff to represent the plaintiff at the enquiry.

[10] Vide letter dated 17 April 2000 to D1, plaintiff applied to appoint ASP Kamaruzzaman bin Hj Jaafar from the (Kelantan) Gua Musang police district headquarters to represent the plaintiff at the enquiry fixed for 27 April 2000, but was informed on 23 April 2000 that the ASP was on his Haj leave and could not be contacted, as a result of which the enquiry was adjourned to 15 May 2000, which was subsequently re-scheduled to 22 May 2000.

[11] On 17 May 2000, the plaintiff received a police message to the effect that ASP Kamaruzaman could not represent the plaintiff as he had to attend a course on cyber crime commencing 22 May 2000. Further, important witnesses were not present on 22 May 2000 and so the enquiry was re-fixed for 28 June 2000.

[12] The plaintiff then re-applied to appoint DSP Aravindhakshan a/l Krishnan who was rejected by D1 vide letter 2 June 2000 on the ground that the DSP was no longer in service.

[13] By letter dated 5 June 2000, the plaintiff applied to appoint Chief Inspector Ismail bin Haji Hamid to represent him at the enquiry. The Chief Inspector had agreed to represent the plaintiff subject to the condition that the enquiry be held before 15 July 2000 as he would thereafter commence his pre-retirement leave.

[14] The enquiry fixed for 28 June 2000 was postponed to 18 July 2000 which was three days after the Chief Inspector's retirement, as a result of which the enquiry fixed for 18 July 2000 had to be postponed to a date to be fixed.

[15] The plaintiff made a fourth attempt, this time to appoint ASP Munusamy a/l Rengasamy from Bukit Aman to represent him and that was approved by D1. The enquiry was fixed for 27 July 2000.

[16] However, ASP Munusamy could not attend the enquiry on 27 July 2000 as he had been engaged in the Basic Training for Constables commencing 17July 2000, until after 27 July 2000 and so the enquiry scheduled for 27 July 2000 had to be postponed to 15 August 2000 which was again postponed to a date to be fixed.

[17] Vide D1's letter dated 28 August 2000, the plaintiff was informed that the enquiry had been fixed for 18 September 2000, but was postponed to a date to be fixed. It was finally fixed for 31 October 2000, and continued on 3November 2000.

[18] In the two affidavits filed by the plaintiff in support of the plaintiff's case, there was no averment to suggest that the plaintiff has ever applied to the adjudicating officer for permission to be represented at the enquiry held on 31 October 2000 and to be continued on 3 November 2000.

[19] D1 has in his affidavit in reply denied the following allegations made by the plaintiff who was put to strict proof thereof:

(a) that on 28 July 2000, D1 had orally told the plaintiff that D1 had been instructed by his superiors viz D2 and D3 to impose on the plaintiff a sentence of dismissal and that the enquiry was a mere drama to dismiss the plaintiff;

(b) that when the enquiry fixed for 27 July 2000 could not proceed, D1 showed his anger by raising, *inter alia*, racist and religious remarks;

(c) that D1 had instructed the plaintiff to write a letter stating that he (the plaintiff) was ready to proceed with the enquiry without any representation in the enquiry to be fixed, but the plaintiff had rejected D1's instruction;

(d) that at the enquiry held on 31 October 2000 and continued on 3 November 2000, D1 had acted as the prosecutor and judge; the plaintiff was not given the opportunity to cross-examine the witnesses; there was no police officer to represent him; the plaintiff's request for his medical report was not acceded to; and the plaintiff's alleged handwriting was not sent to the Chemistry Department for analysis;

(e) that the witnesses had been induced and coached to give false evidence;

(f) that the plaintiff was not given adequate opportunity to defend himself; and

(g) that the plaintiff's dismissal was an act of gross victimisation, totally unfair and in gross violation of the principles of natural justice.

[20] The plaintiff's allegations essentially revolve around the issues of bad faith and breach of the rules of natural justice.

[21] D1's affidavit further averred that for the enquiry held on 31 October 2000 and continued on 3 November 2000, the plaintiff had not applied for permission to appoint any police officer to defend him; and that the enquiry had previously been adjourned seven times from 27 April 2000 to 31 October 2000, on the following grounds:

(1) on 27 April 2000, the complainant could not be contacted;

(2) on 22 May 2000, the plaintiff requested for postponement because ASP Kamaruzaman who represented the plaintiff had withdrawn;

(3) on 28 June 2000, witnesses were not present, and Chief Inspector Ismail could not be appointed to represent the plaintiff by reason of the Chief Inspector's retirement on 15 July 2000, as continuity of the representation at the enquiry was essential;

(4) twice, viz on 18 July 2000 and 27 July 2000, as the plaintiff's representor ASP Munusamy was not present and D1 had other pressing official duties including renewing arms licences, chairing meetings, official visits to Dumai, Indonesia and courses in Kuala Lumpur;

(5) on 24 August 2000, the plaintiff had been remanded in the Melaka Tengah police lock-up pursuant to Alor Gajah report No 1500/2000 and subsequently charged under s 377D of the Penal Code; and

(7) on 4 September 2000, D1 had to attend a course at the Senior Police Officers' College in Cheras Kuala Lumpur.

[22] D1 also averred that the plaintiff had deliberately delayed the enquiry in the hope that the complainant and other witnesses would be inconvenienced and so would decline to give evidence at the enquiry.

[23] D1 explained that he could not approve the plaintiff's application to appoint DSP Aravindhakshan as the DSP had already retired on 1 March 1995 ie some five years prior to the enquiry.

[24] At the end of the enquiry, D1 the adjudicating officer found the plaintiff guilty of all three disciplinary charges against him, and imposed the sentence of dismissal from the Royal Malaysian Police on the first charge, and reprimanded the plaintiff on the other two charges.

III ISSUES FOR DETERMINATION

[25] With the aforesaid factual background, the issues for determination may be formulated as follows:

(1) Has the adjudicating officer D1 denied the plaintiff's right to representation, thereby contravening reg 5? **A**

(2) Who bears the burden of proving the allegations made against D1 in relation to malice and breach of the rules of natural justice? and

(3) Has the plaintiff proved malice and breach of the rules of natural justice in the enquiry conducted by D1? **B**

IV RIGHT TO REPRESENTATION

[26] Mr Sivenasan Achalingam, learned counsel for the plaintiff, submitted that under reg 5, the plaintiff was entitled to the right to representation at the enquiry but D1 has deliberately frustrated the plaintiff's right. Reference was made to *Narinder Singh a/l Jaswant Singh v Ketua Polis Daerah Georgetown & Ors* [1996] MLJU 246. **C**

[27] Learned senior federal counsel Ms Narkunavathy Sundareson contended that D1 had not frustrated the plaintiff's right to be represented and has actually acted in accordance with reg 5. **D**

[28] As the plaintiff's right to representation is to be found in reg 5, I shall refer to it in extenso as follows: **E**

> Representation
>
> 5(1) An officer who is the subject of a disciplinary charge may, in the discretion of the adjudicating authority, be permitted to be represented at the enquiry by a police officer of his choice: **F**
>
> Provided where the adjudicating authority is a police officer delegated with that function, such police officer may not be an officer senior to the adjudicating officer.
>
> (2) Application by an officer for permission to be represented in accordance with paragraph (1) above shall be made in writing to his immediate superior officer who shall transmit such application to the adjudicating officer for decision or, if such superior officer is himself the adjudicating officer, he shall give his decision thereon. **G**
>
> (3) When an officer, who is the subject of a disciplinary charge, has been granted permission to be represented at the enquiry in accordance with paragraph (1) above, the police officer nominated by the officer shall, subject to his agreement to represent such officer, be made available to appear at the enquiry unless it is inexpedient to do so. **H**

[29] It needs to be observed that, consistent with the proviso to reg 5(1), all the police officers appointed to represent the plaintiff are not officers senior in rank to the adjudicating officer D1. **I**

A **[30]** In my view, the legal effect of reg 5 is that the plaintiff as an officer who is the subject of the above disciplinary charges may avail himself of the permission to be represented at the enquiry by a police officer of his choice under reg 5(1), and such permission may be granted at the discretion of the adjudicating officer.

B **[31]** The availability of the permission to be represented is subject to the mandatory condition precedent that the plaintiff must make an application in writing to his immediate superior officer who shall transmit it to the adjudicating officer for decision, under reg 5(2).

C **[32]** The discretion to grant or refuse permission is a judicial or quasi-judicial discretion which must be exercised, not capriciously or unreasonably, but judicially having regard to established principles and all the facts and circumstances in each particular case.

D **[33]** This permission to be represented, once granted by the adjudicating officer, shall be elevated to the status of a right under reg 5(3), as the police officer ('the representor') nominated by the plaintiff shall be made available to appear at the enquiry.

E **[34]** After the elevation of the permission under reg 5(1) to a right under reg 5(3), such a right is subject to two conditions subsequent, viz first the representor must agree ie ready, able and willing to represent the plaintiff and secondly it is not inexpedient for the representor to appear for the plaintiff at the enquiry.

F **[35]** In *Narinder Singh*, cited for the plaintiff, although two issues were raised for determination, only one issue was pursued and that was whether the finding of guilt and dismissal of the plaintiff by the first defendant was a nullity on the ground that it contravenes reg 3(4). Vincent Ng J answered it in the affirmative. That case does not concern the right to representation under reg 5.

G **[36]** In Johor Bahru High Court Civil Suit 22–144–1997, *Mohd Zaki bin Meon v Hj Mohd Said bin Fadzil & 3 Ors* (unreported) the principal issue for determination was whether the disciplinary proceedings which resulted in the plaintiff's dismissal was conducted in accordance with the rules of natural justice. After a full trial, Syed Ahmad Helmy JC (now J) found that:

H
(1) The disciplinary proceedings proceeded in the absence of the plaintiff's representor, even though the plaintiff had applied for adjournment;

(2) Witness' statements were not handed to the plaintiff;

(3) At the end of the proceedings, the charges against the plaintiff were amended;

(4) The plaintiff was not provided with a table and writing materials during the proceedings; and

I
(5) The plaintiff was not informed of the consequence of the punishment of dismissal if found guilty.

[37] On the above factual matrix, it was held that the refusal to grant an adjournment arising from the representor's absence constituted a denial of natural justice which the Court of Appeal affirmed (NST 8 December 2004).

[38] The above factual matrix may be distinguished from the instant case in that a full trial was held in which the facts vitiating the disciplinary proceedings had been proved by *viva voce* evidence in court, but the plaintiff before me chose to rely on mere affidavits. I shall delve upon this later in my judgment.

[39] Since the facts show that in relation to the enquiry held on 31 October 2000 and continued on 3 November 2000, the plaintiff had made no application for permission under reg 5(1), there is no question of denying or depriving the plaintiff of his right to representation. It seems clear to me that the plaintiff has by such conduct failed to avail himself of the permission to be represented at the enquiry by a police officer of his choice.

[40] The facts before me also show that D1 had rejected the plaintiff's application to be represented by DSP Aravindhakshan as the DSP had already retired on 1 March 1995, and that Chief Inspector Ismail was on the verge of mandatory retirement on 15 July 2000. I am of the view that D1 has not contravened reg 5(1) or (3) as it would be inexpedient for the DSP and the Chief Inspector to represent the plaintiff at the respective enquiry, which in any event did not proceed as scheduled. Hence, I hold that there was no denial of the plaintiff's right to representation.

[41] That being the case, I hold that there is no merit in the plaintiff's contention herein.

IV BURDEN OF PROOF

[42] The plaintiff has made multifarious allegations of bad faith and contravention of the rules of natural justice on the part of D1.

[43] D1 on the other hand had specifically denied all these allegations. For the defendants, it was contended that the plaintiff bears the burden of proof. Support was sought in *Yeap Seok Pen v Government of the State of Kelantan* [1986] 1 MLJ 449 (PC).

[44] On 5 May 2005, I have directed the attention of Ms Sujata Mohandas, the plaintiff's stand-in learned counsel, to the fact that the plaintiff's application was supported by way of mere affidavits and that D1 has put the plaintiff to strict proof of the aforesaid allegations.

[45] I have also asked the learned counsel as to who bears the burden of proving bad faith and the breach of the rules of natural justice, to which she replied that as far as the plaintiff and both his learned counsel are concerned, the affidavits are sufficient and would leave it to the court to decide.

[46] In my judgment, it is trite law that he who alleges must prove it affirmatively as s 101 of the Evidence Act 1950 provides as follows :

> 101Burden of proof
>
> (1) Whoever desires any court to give judgment as to any legal right or liability, dependent on the existence of facts which he asserts, must prove that those facts exist.
>
> (2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

See eg *Tenaga Nasional Bhd v Perwaja Steel Sdn Bhd* [1995] 4 MLJ 673.

[47] It is abundantly clear to me that plaintiff's allegations as adumbrated above are serious and cannot be resolved by way of mere affidavits, especially when they have been vigorously and vehemently denied in the affidavits affirmed by D1. As conceded by the plaintiff's learned counsel, there can be no doubt that the burden of proof is on the plaintiff. This is in consonance with the advice of the Privy Council in *Yeap Seok Pen* where at p 453D left, Lord Graffith said:

> He who asserts bad faith has the burden of proving it, mere suspicion is not enough. In deciding whether the burden is discharged, the court will consider *all the evidence* before it, ... (Emphasis added.)

V ALLEGATIONS OF BAB FAITH, ETC

[48] It was argued for the plaintiff that bad faith and breach of the rules of natural justice had been proved against D1 who was said to have prejudiced the plaintiff's case and subjected the plaintiff to intense mental distress and anxiety by prolonging the period of suspension: Articles 8(2) and 135(2) of the Federal Constitution; *Utra Badi K Perumal v Lembaga Tatatertib Perkhidmatan Awam, Hospital Besar Pulau Pinang & Anor* [1998] 3 MLJ 676; and *Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 1 MLJ 261.

[49] The defendants' stand is that there was no procedural defect in the enquiry as D1 has complied with reg 6.

[50] I have examined the affidavits and all the documentary exhibits including the notes of proceedings recorded by D1 in order to determine the merits of the plaintiff's case.

[51] At the enquiry, D1 was the adjudicating officer, while the plaintiff appeared in person. All the three charges were read over to the plaintiff who admitted that he understood all the charges, to which he claimed trial. All the witnesses consisting of members of the police force and members of the public were carefully cross-examined by the plaintiff who was also given the opportunity to examine the documentary evidence tendered in line with reg 6(3)(b).

Thereafter, the adjudicating officer considered the evidence in great detail and found that there was sufficient evidence for the plaintiff to answer on all the three charges.

[52] The plaintiff in his defence at the enquiry said that:

(1) he had not been represented in the enquiry;

(2) the charges against him were false;

(3) there was no evidence against him;

(4) there were contradictions in the evidence of the witnesses who testified against him; and

(5) there were no eye-witnesses.

[53] Having duly considered the entire evidence, the adjudicating officer D1 found that the plaintiff has failed to rebut the evidence against him and found him guilty of all the charges. Consistent with reg 6(6), the adjudicating officer invited the plaintiff to make a statement, if the plaintiff so wishes, in extenuation of the disciplinary offences and this has been properly recorded by the adjudicating officer D1. In reply, the plaintiff stated that he was not guilty and did not wish to extenuate. The adjudicating officer then imposed the above punishment.

[54] From the notes of proceedings recorded by the adjudicating officer, the affidavit and documentary exhibits filed herein, I am of the view that the enquiry had been conducted by D1 in accordance with all the attributes of a proper judicial or quasi-judicial proceeding.

[55] D1 has pursuant to art 135(2) of the Federal Constitution given the plaintiff a reasonable opportunity of being heard.

[56] The relevant facts in *Utra Badi*, cited for the plaintiff, are that the first defendant, the decision maker had failed to give the plaintiff an opportunity to be heard on the issue of punishment. Vincent Ng J held that it was unjust to deny a civil servant the opportunity to be heard in mitigation before punishment is imposed on him, as the punishment itself involves a further decision-making process; and that there was a procedural error on the part of the decision-maker. This decision was affirmed by the Court of Appeal.

[57] However, on further appeal, the Federal Court through the judgment of Abdul Malek Ahmad FCJ (now PCA) in *Lembaga Tatatertib Perkhidmatan Awam Hospital Besar Pulau Pinang & Anor v Utra Badi a/l K Perumal* [2001] 2 MLJ 417 held, *inter alia*, that there is no separate right to make representations upon the punishment that ought to be meted out, and that the words 'it shall then proceed to consider and decide on the dismissal or reduction in rank of the officer' in GO 26(4) of the Public Officers (Conduct and Discipline) (Chapter D) General Orders 1980 does not mean that they should be another separate hearing.

A **[58]** Be that as it may, the adjudicating officer D1 has done what reg 6(3)(b) and reg 6(6) required of him and has indeed given the plaintiff the opportunity of pleading in mitigation before the punishments were meted out, in line with the decision in *Tan Tek Seng*, where the Court of Appeal at p 81 held, *inter alia*, that when deciding what punishment to impose on a public servant, the disciplinary **B** authority must act reasonably and fairly.

[59] Further, in the absence of *viva voce* evidence which is to be tested by way of cross-examination and re-examination, upon which an evaluation and assessment may be embarked upon, so as to arrive at a mature consideration, I am unable to say that the plaintiff has discharged his burden of proving the **C** allegations of D1's bad faith and breach of the rules of natural justice on a balance of probabilities.

VI CONCLUSION

D **[60]** The plaintiff's originating summons being devoid of merits is hereby dismissed.

VII COSTS

[61] Defendants, in asking the court to dismiss the plaintiff's claim, are praying **E** for costs on a solicitor-client basis under s 2(b) of the Public Authorities Protection Act 1948.

[62] I have invited plaintiff's learned counsel to respond to learned senior federal counsel's above submission. However, plaintiff's learned counsel has declined to do so.

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[63] In my judgment, s 2(b) merits reproduction as follows :

> Protection of persons acting in execution of statutory or other public duty
>
> 2 Where, after the coming into force of this Act, any suit, action, prosecution or **G** other proceeding is commenced in the Federation against any person for any act done in pursuance or execution or intended execution of any written law or of any public duty or authority or in respect of any alleged neglect or default in the execution of any such written law, duty or authority the following provisions shall have effect:
>
> **H** (a) …;
>
> (b) whenever in any such suit or action a judgment is obtained by the defendant, it shall carry costs to be taxed as between solicitor and client; … .

[64] As the plaintiff's originating summons was commenced against, *inter alia*, **I** D1 for D1's act done in pursuance or execution of the Regulations or of his public duty or authority as the adjudicating officer, and judgment has been obtained, inter alia, by D1, the clear provisions of s 2(b) viz the words 'shall

carry costs to be taxed as between solicitor and client' make it mandatory for the award of costs on a solicitor-client basis which I hereby order.

Plaintiff's originating summons dismissed.

Reported by Loo Lai Mee

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